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July 11, 2011

**VIA FAX: (502) 564-3460**  
**AND U.S. MAIL, FIRST CLASS**

Mr. Jeff R. Derouen  
Executive Director  
Kentucky Public Service Commission  
P.O. Box 615  
Frankfort, Kentucky 40602-0615

Re: Case No. 2011-00138  
Reply to Complainant's Response

RECEIVED

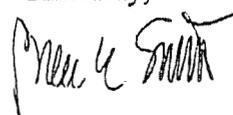
JUL 11 2011

PUBLIC SERVICE  
COMMISSION

Dear Sir:

Enclosed is my client's Reply to Complainant's Response in the above-mentioned case.  
Ten copies of the Reply are attached.

Sincerely,



Bruce E. Smith

Enclosure(s)

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COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

FOREST HILLS RESIDENTS'	)	
ASSOCIATION, INC., and	)	
WILIAM BATES	)	
	)	
COMPLAINANTS	)	
	)	
VS.	)	CASE NO. 2011-00138
	)	
JESSAMINE SOUTH ELKHORN	)	
WATER DISTRICT	)	
	)	
DEFENDANT	)	

REPLY TO COMPLAINANTS' RESPONSE

Comes the Defendant, Jessamine-South Elkhorn Water District ("District"), by counsel, and for its Reply to Complainants' Response to the Motion to Dismiss, states as follows:

As interpreted by the appellate courts of the Commonwealth, KRS 278.040(2) grants exclusive jurisdiction to the Kentucky Public Service Commission ("Commission") only over matters concerning "rates or service". Any issues beyond the questions of rates or service have been excluded from the Commission's purview. *Carr v. Cincinnati Bell, Inc.*, 651 S.W. 2d 126 (Ky. App. 1983).<sup>1</sup> The *Carr* case cited as support for its decision the prior case of *Benzinger, Police Judge v. Union Light, Heat & Power Co.*, 170 S.W. 2d 38 (Ky. 1943). In *Benzinger*, the City of Covington enacted an ordinance requiring utilities, which employed overhead wires mounted on poles to

<sup>1</sup> Cited with approval by the Commission *In the Matter of: Robert S. Strother v. AT&T Communications of the South Central States, Inc.*, Case No. 2007-00415, Order of February 28, 2008 at 6.

distribute their product, to place such wires underground and to remove the poles. In its analysis of that dispute, the *Benzinger* Court applied Ky. Rev. Stat. §3952-27 (1936), the forerunner of KRS 278.040<sup>2</sup> which is closely similar:

Nothing in this section or elsewhere in this act contained is intended to shall be construed to limit or restrict the police jurisdiction, contract rights, or powers of municipalities or political subdivisions, except as to the regulation of rates and service, exclusive jurisdiction over which is lodged in the Public Service Commission.

*Benzinger, supra* at page 752.

This Court quickly decided that the conflict had nothing to do with rates, which only left the question of whether or not service was at issue. At page 753 of the opinion, the Court stated:

Our interpretation of that language is, that the legislature only intended for the word "service" to apply to and comprehend "quality" and "quantity" of the product to be served, and to that end for the word to also include and comprehend any part of the facility of the utility that bottle-necked the required service of quantity and quality; but did not transfer jurisdiction on the commission over other portions of facilities which did not obstruct, prevent or interfere with the quality and quantity of the furnished product. Therefore, when any controversy relating to quantity and quality--preferred either by the municipality against the utility, or by a customer of the latter--the commission was given exclusive jurisdiction of that question, including the further jurisdiction over facilities insofar as any part thereof might obstruct or curtail quality or quantity of the furnished product.

Continuing at page 754, the Court held:

In the instant case it is not complained that the placing of plaintiff's wires under ground would in any manner affect the transmission of its product, either as to quality or quantity. The requirement of the ordinance is but an exercise of the city of its constitutional rights with reference to burdening its streets or

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<sup>2</sup> KRS 278.040(2) reads in part: "The Commission shall have exclusive jurisdiction over the regulation of rates and service of utilities, but with that exception nothing in this chapter is intended to limit or restrict the police jurisdiction, contract rights or powers of cities or political subdivisions."

public ways with the necessary facilities for furnishing utility service. We, therefore, do not agree with either the court, or counsel, in their interpretation of the Public Service Commission Act so as to confer any jurisdiction of the particular question here involved, upon the Public Service Commission.

Although the District does not retreat from the underlying reasons supporting the need for the above ground water storage tank and for the negotiations with the Complainants, the location of the tank on the disputed site does not immediately call into question rates, nor does it place the issue of service in controversy. Consequently, the District would submit that the Complainants' filing does not fall within the Commission's jurisdiction as same is limited under KRS 278.040(2) and KRS 278.260.

Additionally, the District would contend that reduced to its simplest terms, the Complainants are requesting the Commission to become involved in a dispute with the District where their sole concern is the fear that the construction of the tank near them will adversely affect the value of their homes, thereby causing them damages. The Complainants assert that the District has been "unreasonable" in the selection of the site for the tank which is nothing more than an allegation of "negligence" dressed up in the language of KRS 278.060 in order to bring their Complaint within the ambit of the Commission's jurisdiction.

In *Carroll*, *supra*, the court found that the issues raised by the customer's Kenton Circuit Court lawsuit should have been split between that Court and the Commission. The customer's demand for installation of a telephone with a certain number based on a breach of contract was held to be outside the Commission's jurisdiction<sup>4</sup> while his

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<sup>3</sup> Adequate storage capacity and shifting the cost burden incurred switching the tank's site to the selfish few out of concern for an increase in rates to the District's entire customer base.

<sup>4</sup> The customer's demand for installation also included a claim for damages because the number requested would mean toll-free service.

demand for the particular number was found to lie within the Commission's jurisdiction. Complainants are merely seeking to avoid damages by alleging negligence on the part of the District. The court in *Carr* makes it clear at page 128 of its opinion that the Commission's jurisdiction does not reach the issue of damages:

However, appellant seeks damages for breach of contract. Nowhere in Chapter 278 do we find a delegation of power to the SC to adjudicate contract claims for unliquidated damages. Nor would it be reasonable to infer that the Commission is so empowered or equipped to handle such claims consistent with constitutional requirement. Kentucky Constitution § 14.

The Commission has also held that it not only does not have jurisdiction when it comes to awarding damages, but it also does not have the power to determine claims of negligence. *In re the Matter of: John Arthur Yarbrough v. Kentucky Utilities Company*, Case No. 2004-00189, Order of July 13, 2005.

For the reasons that the location of the tank does not immediately call into question the issues of rates or service and because the Complaint raises issues of damages and negligence the District requests its dismissal.



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**Attorney for Defendant**

CERTIFICATE OF SERVICE:

The undersigned hereby certifies that a true copy of the foregoing Reply to Complainants' Response was served by U.S. Mail, first class, postage prepaid, and e-mailing same on July 11, 2011, to:

Robert M. Watt, III  
Monica H. Braun  
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monica.braun@skofirm.com

  
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